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United States Supreme Court

OCTOBER TERM, 1964

No. 878

J. MINOR SULLIVAN, III,
Petitioner,

vs.

STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of New Jersey refusing to grant certification to the Superior Court of New Jersey, Criminal Section, in which it denied petitioner's motion to dismiss his indictment and his motion for new trial. Order filed on November 9, 1964.

OPINION BELOW

The opinion of the Superior Court of New Jersey is found on pages 5a to 8a, inclusive, of the petitioner's brief which was filed in the Supreme Court of the State of New Jersey. The Supreme Court of New Jersey did not file an opinion. The order denying the petition for certiorari to the Supreme Court of the

State of New Jersey was filed on November 9, 1964, as of No. C-45, September Term, 1964 and is a part of the record.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on November 9, 1964. The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. It is a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States for a Grand Jury to return an indictment for perjury where there was not presented to it evidence of all the essential elements of the crime.

2. The petitioner is entitled to a new trial under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF MATTER INVOLVED

Petitioner was convicted by a judge sitting without a jury on seven out of eight counts of a perjury indictment on February 9, 1956. Subsequently, the convictions on three counts were affirmed and on four counts were reversed by the Supreme Court of New Jersey, three justices dissenting. State v. Sullivan, 24 N.J. 18, 130 A.2d 610 (1957).

In 1948, six Negroes in Trenton, New Jersey, were arrested and charged with the murder of William Horner. The petitioner, Dr. Sullivan, became involved when he was requested by Trenton police to witness the confessions of five of the accused. There were two murder trials. State v. Cooper, 2 N.J. 540 (1949),

and State v. Cooper, 10 N.J. 532 (1952). The indictment and conviction of Dr. Sullivan for perjury arose out of the alleged differences in testimony he gave as a witness for the State on direct examination in the first and on cross-examination in the second "Trenton Six" murder trials.

In reversing the conviction of the first trial, the Supreme Court of New Jersey cautioned the trial court as to the possibility of psychological coercion in obtaining the confessions of the five defendants. Thus, at the second trial, the defense prepared themselves to launch on a new theory of psychological coercion. In the words of Chief Justice Weintraub, "The cross-examination of Dr. Sullivan was fantastic." State of New Jersey v. Sullivan, supra, Dr. Sullivan was queried hypothetically as to the effects of various drugs, etc., and what could conceivably cause this, that, or the other. It was in the giving of these opinions that Dr. Sullivan was convicted of perjury.

The indictment upon which Dr. Sullivan was convicted charged in eight counts that the defendant did (a) falsely swear and testify to certain medical opinions and observations made as a result of physical examinations of the defendants in State v. Cooper, supra, and others; (b) and the defendant knew such conditions did not exist as a matter of fact, at the time of the examination of the defendants.

While the abstract proposition that an opinion, as distinguished from a statement of fact, may be perjurious, the inherent danger of injustice when a medical opinion is thus assailed should be recognized. It is commonplace for experts to differ in equal number. The law in this area should be carefully applied. The issue is not whether the defendant's opinion is false, but whether his belief in his opinion is false.

In the trial of Dr. Sullivan, the State of New Jersey did not offer any evidence as to whether or not the belief of Dr. Sullivan in his opinions was false. Indeed, the court committed fundamental error when it ruled that authorities which agreed with Dr. Sullivan's opinion were not admissible. These authorities substantiate Dr. Sullivan in his belief in his opinions and show them not to be baseless.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

Under the due process clause of the Fourteenth Amendment, a state's conviction cannot be brought about by methods that offend a sense of justice. Rachin v. People of California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183; State of New Jersey v. Morriggi, 15 N.J. Super. 479, 83 A.2d 612. The purpose of the due process clause of the Fourteenth Amendment is to protect the accused against an unfair conviction. Adamson v. People of State of California, 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903. Requirement of the due process clause of the Fourteenth Amendment, with respect to criminal proceedings is for a fair trial. Massey v. Moore, Warden, 348 U.S. 105, 75 S. Ct. 145.

The proceedings, in which the petitioner was indicted and convicted of perjury, were so permeated with unfairness that they shock one's sense of justice.

The offense of perjury, for which Dr. Sullivan was convicted, is defined by common law " . . . as the willful assertion as to matter of fact, opinion, belief, or knowledge made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted by an oath . . . such assertion being known to such witness to be false, and being intended by him to mislead the court,

jury, or person." 41 Am. Jur. Perjury § 2, p. 4. Perjury is controlled by statute in most jurisdiction. The State of New Jersey, by statute, provides that the defendant must "willfully and corruptly" commit perjury before it is punishable. N.J.S. 2A: 131-1. The mere proof of prior inconsistent statement is insufficient. 41 Am. Jur. Perjury § 66, p. 36; 2 Wharton, Criminal Law (12th ed. 1932). The State must charge and prove which of the two statements is perjurious.

Yet, in the instant case, Dr. Sullivan was indicted by the stenographer's reading of excerpts of his testimony in two prior trials. Clearly, the indictment was baseless. It is basic that vital elements of crime must be presented to the Grand Jury before it can return an indictment. What is conspicuously absent in the presentment of Dr. Sullivan's case to the Grand Jury is any showing of wilful and corrupt intent which are vital elements of the crime of perjury.

In the trial of Dr. Sullivan for perjury, the trial court found falsity in only the medical opinions of Dr. Sullivan. The court found that Dr. Sullivan lied in the aspect of his testimony in the second trial concerning psychological coercion. Even though this finding is insufficient to constitute the offense of perjury, it is baseless. The ingredients of wilfull and corrupt intent are lacking.

It is important to note that at the first trial of the "Trenton Six" the element of psychological coercion was not an issue. Therefore, neither the State, nor the defense went into the matter. They were only concerned with physical coercion in the giving of the confessions, and thus Dr. Sullivan was only questioned as to the physical appearance of the defendants.

However, because of the warning in the opinion of the Supreme Court of New Jersey in reversing the first trial, the issue of psychological coercion of the defendants in giving their confessions became extremely important in the second trial. The issue was deeply delved into and exhausted by the defense in its cross-examination of Dr. Sullivan. It is at this point that the State contended the petitioner perjured himself. This contention is baseless. Had the defense gone into the same matter in questioning Dr. Sullivan at the first trial, it would have gotten the same answers from him as it got in the second trial.

Exhibits D-4 and D-5 were notes that Dr. Sullivan made when he was conducting his examination of the defendants.. (P18a and 19a). They were of no consequence to either of the parties in the first trial of State v. Cooper, supra, as the defense had only routine concern with the physical conditions found by Dr. Sullivan. However, they were extremely important in the second trial because they were relative to psychological coercion.

Petitioner offered Exhibits D-4 and D-5 in evidence at his trial to show that his testimony was potentially consistent and consistent in both trials of State v. Cooper, supra. However, they were rejected on the ground that the statements contained therein were self-serving. This was fundamental error and precluded the petitioner from offering evidence which would probably have resulted in his acquittal. Conclusive proof of the reliability of D-4 and D-5 is found in the signed affidavits of Thorn Lord (P12a-20) and Josephine Williams Holsinger (P11a) and the unsigned affidavit of Frank S. Kaizenbach, III (P15a) (he had indicated his intent to sign the affidavit but unfortunately he died before this could be done).

The trial court, in its special findings of fact, concluded with the single "finding."

> "I determine that there was not any basis in fact for the medical opinions expressed by Dr. Sullivan while testifying at the second murder trial to the observations he made of the murder defendants in the First Precinct Police Station on February 10 and 12, and the said opinions expressed by the defendant were false and at the time he made them he knew them to be false." (Emphasis added.)

It is important to note that even though the trial court found that there was no basis in fact for Sullivan's medical opinions and that they were false, it rejected his evidence as to the basis of his opinions (Exhibit D-4) and precluded him from showing that there are many prominent experts in the field who are in accord with his opinions.

This was State action which rendered the petitioner's trial so unfair that it constituted a violation of the due process clause of the Fourteenth Amendment of the United States Constitution. See United States ex rel. Meers v. Wilkins, 326 F.2d 135.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted to review the judgment of the Supreme Court of New Jersey.

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APPENDIX

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APPENDIX

Appendix A

Constitution Provision Relied Upon for the Appeal.

> "...Nor shall any state deprive any person of life, liberty, or property, without due process of law;..." U.S. Const. amend. XIV, § 1.

Appendix B

Portion of Record to Show Proper and Timely Raising of Federal Question.

Motion for New Trial in Court Below.

Is the Petitioner entitled to a new trial under the due process clause of the Fourteenth Amendment of the Constitution of the United States?

(Court Below decided in the negative.)

Is it a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States for a Grand Jury to return an indictment for perjury where there was not presented to it evidence of all the essential elements of the crime?

(Court Below decided in the negative.)

Appendix C

Opinions of Court Below.

The Superior Court and the Supreme Court of New Jersey did not write an opinion in this proceeding.

Appendix D

Judgment of Decree Sought to be Reviewed.

ORDER DENYING PETITION
(Filed 11/9/64)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 9th day of November, 1964.

s/ John H. Gildea
Clerk of the Supreme Court

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J. MINOR SULLIVAN, III,

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vs.

STATE OF NEW JERSEY.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Can an indictment be attacked after trial, conviction and affirmance on appeal?

2. Are rules of procedure of state courts to be ignored?

3. Are trial errors, if made, a deprivation of due process?

COUNTER-STATEMENT OF FACTS

On February 10, 1948, J. Minor Sullivan, M.D. and George A. Corio, M.D. were requested by the then prosecutor to go to the Trenton police headquarters. There they examined five individuals who executed statements. Two days later they examined a sixth person at the time he executed a statement. Both Dr. Sullivan and Dr. Corio testified at the two subsequent trials of the said individuals for murder. State v. Cooper (1942) 2 N.J. 540 and (1952) 10 N.J. 532.

On December 23, 1952, the Mercer County Grand Jury returned an indictment charging Dr. Sullivan with perjury in the second trial. On January 29, 1953, a motion was made to dismiss the indictment on the grounds it did not charge a crime, did not advise the defendant with what crime he was charged, the allegations of falsity were not sufficiently certain and it did not recite contradictory facts. After denial of the motion, leave to appeal was secured. On May 11, 1953, the Appellate Division of the New Jersey Superior Court affirmed the denial of the motion. 25 N.J. Super. 484. Certiorari was denied by the New Jersey Supreme Court and this court. 13 N.J. 289 (1953); 347 U.S. 903 (1954).

Meanwhile another indictment was returned charging the defendant with false swearing based on the same facts. This indictment was also attacked. The Appellate Division of the New Jersey Superior Court found this pleading proper, 33 N.J. Super. 138 (1954).

The trial commenced on January 23, 1956, and required nine days to conclude. The Court, sitting without a Jury, found defendant guilty on all counts except the fifth. Motion for a new trial was made and denied. Appeal was had to the New Jersey Supreme Court. The conviction was affirmed as to three counts and reversed as to the same number. 24 N.J. 13 (1957). Certiorari was denied by this Court on September 28, 1957. 355 U.S. 52 (1957).

The defendant, five years later, on August 16, 1962, moved for the quashing of the indictment and for a new trial. Defendant received leave to inspect the Grand Jury minutes and ascertained the only witness who appeared before the Grand Jury was the then court reporter, Gladys Barry.

On May 12, 1964, the trial court denied defendants latest motions. From that denial the defendant sought certiorari. The New Jersey Supreme Court denied same on November 9, 1964, 43 N.J. 356. Certiorari is now sought to this Court.

LEGAL ARGUMENT

Petitioner alleges as reasons for the allowance of the writ the purported insufficiency of evidence before the Grand Jury, the exclusion of proffered exhibits and other alleged trial errors.

POINT I

Judicial Errors by State Courts Do Not Violate the Fourteenth Amendment.

Petitioner contends that notations made previous to his trial should have been allowed in evidence. This contention was specifically raised by petitioner in his initial Appeal to the New Jersey Supreme Court. 24 N.J. 13. It was also raised in petitioner's former application for certiorari to this Court. 355 U.S. 52. The New Jersey Supreme Court held that the Trial Court's decision was correct. This Court refused to review that determination.

Assuming for the purpose of this argument that the Trial Court's action was indeed erroneous, same would not constitute a proper ground for review by this Court. Gryger v. Burke, (1948) 334 U. S. 728, rehearing denied. 355 U.S. 837. Even if errors are made by a trial judge they are not a deprivation of due process.

POINT II

Petitioner's Motions Were Not Timely Made.

Petitioner was convicted on February 9, 1956. Several years thereafter he made a motion to quash the indictment or in the alternative for a new trial. The New Jersey Supreme Court has adopted rules for the conduct of criminal proceedings before the Courts of that State. Among those rules is found R. R. 3:5-5 (b) (2). That provision of our rules at the time in question was as follows:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment or accusation other than that it fails to show jurisdiction in the court or to charge an offense must be raised by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure so to present any such defense or objection constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or accusation to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

Presumably, the instant attack on the indictment is pursuant to the above cited provision of the rules of the New Jersey Criminal Procedure. Said provision clearly requires such attacks be made prior to trial. It further provides that failure to object prior to trial constitutes a waiver thereof. The rule does contain provision for extraordinary cases "For cause shown" relief may be granted despite failure to move prior to trial. No effort was made to show any such "cause" in these proceedings. Lacking same, the quoted provisions of the rule bar the motion attacking the indictment.

The companion motion for a new trial was made pursuantly in accordance with the provisions of New Jer-

sey R. R. 3:7-11 (a). That provision of the New Jersey procedural rules is as follows:

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made at any time, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 10 days after verdict or finding of guilt, or within such further time as the court may fix during the 10-day period.

Under the New Jersey Court rules a motion for new trial on the basis of newly discovered evidence may be made at any time while all other motions for a new trial must be made within ten days of the judgment of conviction. Each and every ground now advanced for the granting of a new trial was considered by the Trial Court and the New Jersey Supreme Court on Appeal. Such evidence cannot be termed newly discovered evidence. Accordingly the motion is barred by the said rule, R. R. 3:7-11, since it was not made within ten days of the conviction.

The aforementioned rules were adopted by the New Jersey Supreme Court to regulate the conduct of criminal cases. There is nothing discriminatory in the rules and they are reasonably necessary to insure an orderly procedure for the conduct of the business of the New Jersey Courts. These rules apply to all criminal cases and hence cannot be deemed violative of any constitutional right of the petitioner.

POINT III

The Indictment Having Served Its Purpose Cannot Now Be Nullified.

An indictment is the vehicle used to present the defendant before the bar of justice requiring him to stand trial to determine his guilt or innocence of the charge against him. The requirement of an indictment is to prevent corrupt or overzealous prosecuting authorities from bringing unfounded charges against the citizenry. However, once guilt has been established the indictment has fulfilled its function, particularly when that guilt has been affirmed on appeal. People v. Giordano, (N. Y. Ct. App. - 1921) 231 N. Y. 633; People v. Nitzberg, (N. Y. Ct. App. - 1943) 289 N. Y. 523, 47 N. E. 2d 37. Accordingly, the indictment cannot now be successfully attacked.

CONCLUSION

The petition should be denied for the foregoing reasons.

Respectfully submitted,

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